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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 355

ROBERT WENDELL HAINSWORTH, *Petitioner.*

vs.

HARRIS COUNTY COMMISSIONERS' COURT, *et al., Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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vs.

HARRIS COUNTY COMMISSIONERS' COURT, *et al., Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF ERROR

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Respondents, who are the County Judge and Commissioners' Court of Harris County, Texas, take no exception to the Petitioner's reference to opinions cited below nor the correctness of the Texas Statutes and Constitutional provisions set forth by Petitioner, and therefore the same are not repeated, pursuant to Rule 40(3) of the Revised Rules. Respondents recognize potential jurisdiction in the Supreme Court on

the basis of a "right . . . claimed under the Constitution . . . of the United States", but contend that no point for consideration has in fact been raised by this Petitioner.

Respondents further submit that the questions presented for review are incorrectly set forth in Petitioner's brief. Respondents contend that the only

QUESTION PRESENTED

is: *Whether the facts proved by the record were sufficient to require the trial court to issue its writ of mandamus under the laws of the State of Texas.*

CONCISE STATEMENT OF THE CASE

Robert Wendell Hainsworth, Petitioner, was plaintiff in in the District Court of Harris County, Texas, and Respondents, the County Judge and Commissioners' Court of Harris County, Texas, were defendants in the trial court. We shall designate the parties as they were designated in the trial court. Plaintiff sued defendants for a writ of mandamus to require defendants to remove the sign "Colored" from a table in the Harris County Law Library and to prevent practices of restricting the use of tables in the library on the basis of color. The *only* record developed at trial was the introduction of a stipulation agreed upon by the parties reading in its entirety as follows:

> "It is hereby stipulated in the above entitled and numbered cause as to the following Statement of Facts:
>
> "That in the Harris County Law Library situated in Harris County, Texas, there is a special

table, designated 'Colored', for the exclusive use of litigants and lawyers who are colored and which is restricted from use by those who are not colored; and when use of the Library is made by colored litigants or lawyers one-at-a-time, they are restricted to the use of such table, but when use of the Library is made by more of them than one-at-a-time, they are only restricted to the use of whatever table in the Library to which they are assigned by the Librarian and the table to which they are assigned is restricted from use by litigants or lawyers who are not colored throughout the time of its being used by those who are colored.

"That on December 20, 1951, the Plaintiff petitioned the Harris County Commissioners Court to disapprove of the above policy of segregation and of designation of a table in the Harris County Law Library, 'Colored', and in their practice of the restrictive use of tables in the Harris County Law Library on the basis of color.

"That on January 24, 1952, the Harris County Commissioners Court, the Defendants, denied the petition of the Plaintiff."

No witnesses were introduced and no proof was made beyond the above-quoted stipulation.

No statement of facts was filed on appeal in the state courts and no findings of fact were requested or made. The trial court filed an opinion and rendered judgment, making general findings that the evidence and facts of law were with the defendants.

ARGUMENT

Since no statement of facts was filed on appeal, actually the appellate courts of Texas had nothing before them to consider. Under Texas law, it is presumed that, in the absence of a statement of facts, all facts necessary to sustain the judgment were proved by the defendants and found by the court below. *Commercial Credit Corporation vs Smith* (Tex. 1945), 143 Tex. 612, 187 S. W. (2d) 363; *McElyea vs Parker* (Com. Apps. B., 1935), 125 Tex. 225, 81 S. W. (2d) 649; *Hursey vs Thompson* (Tex. 1943), 141 Tex. 519, 174 S. W. (2d) 317; *Anchor vs Wichita County Water Imp. Dist. No. 2* (Com. App. B., 1937), 129 Tex. 385, 103 S. W. (2d) 135, 112 A.L.R. 70; opinion adopted; *Lane vs Fair Stores, Inc.* (Tex. 1951), 243 S. W. (2d) 683. Even if all evidence introduced (being simply the stipulation) is to be considered, still there is no finding and in fact no evidence in the record of any of the following matters:

That plaintiff is a citizen of the State of Texas or of Harris County or that he is a practicing attorney or has any right or authority to use the Library at all; nor that the Library referred to is owned or operated by Harris County or under the cited statutes of the State of Texas.

There is in fact no evidence of any prohibition against plaintiff or any colored lawyer using any and all books in the Library; there is nothing to show that the table assigned to colored people is less advantageously situated than other tables with respect to lighting, air, closeness to books, or any other particular, and no impediment is shown to plaintiff's unlimited use of the library facilities; there is no showing that the

table is crowded and no showing of any insulting or derogatory remarks or that the Librarian or other attendants ever failed to assist the plaintiff in any way. In fact, there is not even any showing that Petitioner is colored and under Texas jurisprudence, a court will not take judicial notice of a litigant's color. *Fuller vs Texas Park Lot* (T.C.A., Ft. Worth, 1939), 133 S. W. 2d 605 (no writ). *Pauska vs Daus* (Tex. 1868), 31 Tex. 67.

There is no evidence (indeed no pleading) of any discrimination against plaintiff nor any inequalities suffered by him.

As the action is one for mandamus, plaintiff is required to plead and prove with particularity everything necessary to sustain the alleged cause of action and even to negative defenses and to prove all necessary allegations, even negative in nature.

Houston Tap and Brazoria R. Co. vs Randolph (Tex. 1859), 24 Tex. 317;

Johnson vs Elliott, Tax Collector (T.C.A., Texarkana, 1914), 168 S. W. 968, writ ref.;

Harmon vs City of Dallas (T.C.A., Dallas, 1950), 229 S. W. (2d) 825, writ ref., n.r.e.;

Sartin vs Hudson, et al (T.C.A., Ft. Worth, 1940), 143 S. W. (2d) 817;

Watkins vs Huff (T.C.A., San Antonio, 1901) 63 S. W. 922, writ dism., 94 Tex. 631, 64 S. W. 682.

King vs Guerra (T.C.A., San Antonio, 1927), 1 S. W. (2d) 373 (on motion to retax costs), 13 S. W. (2d) 908.

Plaintiff must also show that he has made all necessary requests or demands and has taken all necessary preliminary steps.

Harney vs Pickens (Tex. 1931), 120 Tex. 268, 37 S. W. (2d) 717;

Hursey vs Bond (Tex. 1943), 141 Tex. 337, 172 S. W. (2d) 305;

Kemp vs Wilkinson, District Judge (Tex. 1924), 113 Tex. 491, 259 S. W. 912;

Oliver vs Gallagher (Tex. 1930), 119 Tex. 178, 26 S. W. (2d) 903;

28 Tex. Jur. 552.

Among other things, plaintiff must show a justiciable interest; the exact import of the rule or practice complained of; that it applies to him; that it will deprive him of some right; that he expects to use or has reason to use the Library. The presentation of a mere abstraction or abstract right is not sufficient ground for writ of mandamus.

Mitchell, et al vs Dixon et al (Com. App. A, 1943) 140 Tex. 520, 168 S. W. (2d) 654, opinion adopted;

Yett vs. Cook (Tex. 1926), 115 Tex. 205, 281 S. W. 837;

McCarty vs Jarvis (T.C.A., Ft. Worth, 1936), 96 S. W. (2d) 564, writ dismissed;

Glover vs Cobb, et al (T.C.A., Dallas, 1938), 123 S. W. (2d) 794, writ refused;

Marr vs Reynolds (T.C.A., Eastland, 1941), 151 S. W. (2d) 263, writ dismissed, judgment correct.

Nor will a writ of mandamus be issued to plaintiff on account of any wrong done or threatened to anyone other than himself.

McLaughlin vs Smith (T.C.A., Amarillo, 1911), 140 S. W. 249, writ refused;

Armstrong vs Gaddis (T.C.A., San Ant., 1948), 214 S. W. (2d) 149.

Under principles of law governing mandamus actions, plantiff has completely failed to show any cause of action whatever.

The Petitioner has not by the record raised any actual point of controversy. At most, there are presented mere abstractions regarding segregation and the dignity of man but in no way related to any facts that were presented for consideration below to the trial court in the petition for mandamus. This Court has repeatedly refused to pass on abstract questions not presenting a justiciable controversy concrete in character showing a violation or threatened violation of rights of the person complaining. *Ashwander vs Tennessee Valley Authority*, 297 U. S. 288, 56 Supreme Court 466, 80 L. Ed. 688.

And, further, this court has repeatedly refused to pass upon constitutional questions, even though properly presented by the record, if there is also present some other ground upon which the case may be disposed of. *Ashwander vs Tennessee Valley Authority*, supra. The Texas courts have properly ruled on the application for mandamus, based upon the numerous Texas authorities above cited. Petitioner's application for writ of certiorari should be denied because he has not presented any Constitutional issue in the state court, and, in the alternative, because the state court judgment can be sustained on grounds independent of the Constitutional issue involved. *Berea College vs Kentucky*, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

DE LANGE, HUDSPETH AND PITMAN

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Certificate of Service

Two copies of the foregoing brief in opposition to Petitioner's Petition for Writ of Certiorari were delivered to the Petitioner, Robert Wendell Hainsworth, 210 Pilgrim Building, Houston 2, Texas, on this 16th day of October, 1954.

C. M. HUDSPETH,
Of Counsel for Respondents

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HARRIS COUNTY COMMISSIONERS' COURT, *Respondent*

REPLY BRIEF OF PETITIONER

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In The

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HARRIS COUNTY COMMISSIONERS' COURT, *Respondent*

REPLY BRIEF OF PETITIONER

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

It is respectfully submitted that the questions presented for review in the Petition for Writ of Certiorari are correctly stated therein, and that the Respondent is in error in stating that the question presented is: Whether the facts proved by the record were sufficient to require the trial court to issue its writ of mandamus under the laws of the State of Texas.

Accordingly, this Reply Brief is to show that the facts proved by the record were sufficient to require the trial court to issue its writ of mandamus under the laws of the State of Texas, for the two reasons listed below.

ARGUMENT

I. In Broad Aspect Of The Case No Special Right Need Be Shown

In petition of plaintiff in trial court, plaintiff

stated therein, " * * * all members of the bar of Harris County have the right to the use of the facilities without restriction based upon color * * * ". And the plaintiff sought, " * * * that on final hearing, Mandamus issue, ordering Defendants to remove the sign designated 'Colored', from the table in the Harris County Law Library and to stop the arbitrary practice of restricting use of tables in the Harris County Law Library, on the basis of color, * * * * ".

When the relief sought is merely for the protection of a private right, the relator must show some personal or special interest in the subject matter. But, otherwise, when the question is one of public right. In *McLaughlin v. Smith,* 140 S.W. 248, it was held: When the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the people ought to be regarded as the real party in interest, and that the relator, at whose instigation the proceedings are instituted need not show that he has any interest special and peculiar to himself, in the result and that it is sufficient to show that he is a citizen and as such interested in the execution of the laws.

II. Even Granting That Special Right In Petitioner Need Be Shown For The Issuance Of The Writ

Under Texas law, the writ of mandamus will issue: Where there is a clear legal right on the part of the petitioner; Where there is a legal duty on the part of respondent; and Where there is a breach of that duty by respondent.

Facts Proved By The Record Showing Clear Legal Right On Part Of Petitioner

The Final Judgment of the Trial Court (R-C.C. A.-) states therein within the first paragraph: * * * "and all matters of law and of fact having been submitted to the court, all parties thereupon announced that they had, subject to the court's approval, agreed upon a written stipulation to comprise the entire statement of facts in this cause", * * *. Thus, the Stipulation constituted the Statement of Facts in the cause.

In the petition of plaintiff in trial court which was verified, plaintiff alleged that he resided in Harris County, Texas; and that he was a duly licensed Attorney and Counsellor at Law of the State of Texas, and practicing in Harris County, Texas; and that there is located in the Harris County Courthouse of Harris County, Texas, a law library which is for the use of Attorneys and Counsellors at Law practicing in Harris County, Texas. Under Texas law, in mandamus actions, when the petition is verified and unverified general denial will be treated as a nullity. *Brown v. Reese,* 7 S.W. 489. The general denial of the respondent was not verified. Allegations are deemed to be admitted when they are not denied under oath. In mandamus proceedings an answer neither admitting nor denying a fact is an admission of the fact. *Giraud v. Winslow,* 127 S. W. 1180; *Houston Electric Co. v. Mayor & City Council of Houston,* 212 S. W. 198.

Authority to use the law library is shown in the Stipulation which states that in the Harris County

Law Library there is a special table, designated "Colored", for the exclusive use of litigants and lawyers who are colored and which is restricted from use by those who are not colored.

The segregation complained of in and of itself, the discriminatory practice and sign, based solely on color, in a County Courthouse or on State property, is a manifest inequality, and is unconstitutional, being directly prohibited by Section I, of the Fourteenth Amendment to the Constitution of the United States.

In the petition of plaintiff in trial court which was verified, plaintiff alleged that the plaintiff in making use of the Harris County Law Library, has been required in acordance with an arbitrary rule and practice of the Law Library Committee of Harris County to sit at a designated table in the law library with a sign thereon marked "Colored". This allegation shows that plaintiff is colored, and as it was not denied under oath, or even denied at all, in the answer of defendants in the trial court, is therefore admitted. *Brown v. Reese,* 7 S. W. 489; *Giraud v. Winslow,* 127 S. W. 1180.

The entire pleading of the parties, the petition of the plaintiff and answer of defendants, together with the stipulation, the final judgment and the opinions of the trial court, and the court of civil appeals, are instinct and replete with the fact, the understanding, and conclusion that the plaintiff is colored.

The trial court took judicial notice of the fact that the plaintiff was an attorney and of the fact that plaintiff was colored. In *Stripplemann and Another*

v. Clark, 11 Tex. 296, the court held: The signatures of attorneys of record are judicially known to the courts. The trial court in its opinion said: "Although the trend of the United States Supreme Court's decisions seems to be in the direction of the plaintiff's views, yet * * * they are not sufficient as I see it to justify this court sitting as a judge in a sovereign State generally recognizing the principle of segregation, * * * ".

The Court of Civil Appeals recognized and took judicial notice of the fact that appellant, plaintiff below, was colored by stating in its opinion that, "This appeal by the apellant, a colored man, * * * ". " * * * and the appellant having orally argued the cause for himself here, as the sole party thereto, in the same way the trial court's record shows he had done below, * * * " " * * * Indeed, as this Court sees it, appellant has presented no question whatever as to there having been any infringmement of any constitutional rights of his, unless it could be said that his having been so seated in the library without discrimination or inequality, and without any impairment to him of its benefits, had constituted, a discrimination against him; whereas, he plead no discrimination, inequality, no injury or damage; nor did he make any effort to prove any of such things. Whereas, further, it would appear that the Supreme Court of the United States itself has held that such single segregation—if it could be called that—of the appellant in this instance, did not infringe upon any constitutional guaranty to him. *Plessy v. Ferguson* 163 U. S. 537, 41 L. Ed. 256; * * * ".

Pauska v. Daus, 31 Tex. 68, and*Fuller v. Texas Park Lot,* 133 S. W. 2d 605, are inapposite. In *Pauska v. Daus,* it was held: That where the question of the right of negroes to sit upon a jury did not appear otherwise than in a motion for a new trial it could not be revised.

In *Fuller v. Texas Park Lot,* where there was testimony in the trial court as to the identity of two persons, one of whom would be liable for an injury inflicted by an automobile, the court of civil appeals though requested by counsel for appellee; could not take judicial notice of the color of appellee.

Facts Proved By The Record Showing A Legal Duty On The Part Of Respondent

The name of the Harris County Law Library as stated in the Stipulation indicates that the Library referred to is owned or operated by Harris County.

The $1.00 charged as costs, and taxed, collected and paid as other costs (R-C.C.A.-18) indicates that the Harris County Law Library is owned or operated by Harris County or under the cited statutes of the State of Texas.

The deliberation of the Harris County Commissioner's Court upon the petition of the plaintiff after presentation, and then their denial of the petition more than a month after presentation is indicative of their authority over the Harris County Law Library, and that the Harris County Law Library is a state instrumentality for they were acting as State officers in the regulation of the Harris County Law Library for State action means action not by private citizens

but by those clothed with the authority and the influence which official position affords. The vital requirement is State responsibility or county responsibility, that somewhere, somehow, to some extent, there be an infusion of conduct by officials, coupled with State or county power, into any scheme by which colored citizens are denied the equal protection of the laws, or deprived of liberty without due process of law, merely because they are colored.

Further and conclusive evidence that the Harris County Law Library is owned or operated under the cited statutes of the State of Texas is shown in the opinion of the trial court wherein the Trial Court stated: Although the trend of the United States Supreme Court's decisions seems to be in the direction of the plaintiff's views, yet under the doctrine of Stare Decisis (the rule as to the preceding case control) they are not sufficient as I see it to justify this court sitting as a judge in a sovereign State generally recognizing the principle of segregation, to issue its drastic Writ of Mandamus to override the Law Library Committee of this county and the government of Harris County, in its present plan of operating the law library for the benefit of the Bar generally". (Petition for Writ of Certiorari—P. 16).

Facts Proved By The Record Showing A Breach Of Legal Duty On The Part Of Respondent

In order to show a default, it must appear that performance of the duty has been demanded of the respondent and that the respondent has refused or failed to perform it. In *Harney v. Pickens,* 37 S. W.

2d 717, the case was before the Supreme Court of Texas, on motion for leave to file a petition for writ of mandamus, prohibition, etc. Held: Petition for writ of mandamus to enforce private right must generally allege performance of duty was demanded, and that respondent failed to perform or must allege conduct showing futility of demand for performance.

In the verified petition of plaintiff, the plaintiff alleged performance of duty was demanded, and that the defendants, or respondent failed to perform. The Stipulation also shows the request of plaintiff, and the refusal, by respondent.

CONCLUSION

It is respectfully submitted that a substantial Federal Constitutional question has been raised at the proper point in the state court proceeding. The decision of the Trial Court is not based on a non-federal ground, while the decision of the highest State Court is based on a non-federal ground, which non-federal ground does not independently and adequately support the judgment.

For the reasons above stated it is repectfully submitted that under Texas law the facts proved by the record were sufficient to require the Trial Court to issue its writ of mandamus.

Respectfully submitted,

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